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STATE OF CALIFORNIA

OFFICE OF ADMINISTRATIVE LAW

2007 OAL DETERMINATION No. 4
(OAL FILE # CTU 06-0928-01)

Debra Bowen
DEBRA BOWEN
SECRETARY OF STATE

REQUESTED BY: COUNCIL ON AGING, SILICON VALLEY, INC

AGENCY: DEPARTMENT OF AGING

CONCERNING: PROGRAM MEMO NO. PM 04-22(P) DEALING WITH "ONE-TIME-
ONLY FUNDS"

DETERMINATION ISSUED PURSUANT TO GOVERNMENT CODE
SECTION 11340.5.

SCOPE OF REVIEW

A determination by the Office of Administrative Law (OAL) evaluates whether or not an action or enactment by a state agency complies with California administrative law governing how state agencies adopt regulations. Nothing in this analysis evaluates the advisability or the wisdom of the underlying action or enactment. Our review is limited to the sole issue of whether the challenged rule is a "regulation" as defined in Government Code section 11342.600, and must, therefore be adopted pursuant to the Administrative Procedure Act (APA). OAL has neither the legal authority nor the technical expertise to evaluate the underlying policy issues involved in the subject of this determination.

ISSUE

On September 28, 2006, the Council on Aging, Silicon Valley, Inc. (Petitioner) submitted a petition to OAL alleging that the California Department of Aging (CDA) issued, used, enforced, or attempted to enforce an underground regulation¹ in violation of Government Code section 11340.5.² The alleged underground regulation is a paragraph in CDA's Program Memo NO. PM 04-22(P) (Memo). Section G of the Memo limits the use of

¹ An underground regulation is defined in Title 1, California Code of Regulations, section 250:

"Underground regulation" means any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined in Section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA.

² Unless specified otherwise code references are to the California Government Code.

federal One-Time Only funds to one-time-only purposes and prohibits the use of the funds to increase baseline needs. The funds can be used only for the following purposes:

- (a) The purchase of equipment which enhances the delivery of services to the eligible services population.
- (b) Home and community-based projects which assist families and/or caregivers to maintain the eligible services population in a home environment, as approved by the Department.
- (c) Innovative pilot projects as approved by the Department.

DETERMINATION and CONCLUSION

In issuing a determination, OAL renders an opinion as to whether a challenged rule is a "regulation" as defined in section 11342.600, which should have been, but was not, adopted pursuant to the APA. Section 11342.600 defines "regulation" to mean "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to, implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure." In *Tidewater Marine Western Inc. v. Victoria Bradshaw*, 14 Cal.4th 557, 571 (1996), the California Supreme Court found that:

A regulation subject to the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.) has two principal identifying characteristics. First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. Second, the rule must implement, interpret, or make specific the law enforced or administered by the agency, or govern the agency's procedure (Gov. Code, § 11342, subd. (g)).

For an agency rule to "apply generally" it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order³. Section G of the Memo applies generally to all members of an open class, e.g., all Area Agencies on Aging. Furthermore, section G of the Memo implements 42 U.S.C. 3025(a)(2)(C), 42 U.S.C. 3028, 42 U.S.C. 3030a, 42 U.S.C. 3030s-1, 42 U.S.C. 3058a, and Welfare and Institutions Code Sections 9100, 9112 and 9719.5. Thus, section G of the Memo meets the definition of "regulation." OAL also finds that section G of the Memo does not fall within any express statutory exemption from the rulemaking requirements of the APA. Therefore, section G of the Memo is an underground regulation.

³ *Roth v. Department of Veteran Affairs* (1980) 110 Cal.App.3d 622, 630, 167 Cal.Rptr. 552, 556; see *Faulkner v. California Toll Bridge Authority* (1953) 40 Cal.2d 317, 323-324 (a standard of general application applies to all members of any open class.)

On November 30, 2006, CDA agreed that the challenged provision in the Memo "violates the California Administrative Procedure Act (APA)." ⁴ CDA has published a Notice of Proposed Action and is following the procedures in the APA to adopt this provision into regulation. Although the final regulation package has not yet been submitted to OAL for review, CDA has, through informal telephone calls, kept OAL abreast of the status of the rulemaking process and it is progressing according to schedule.

April 2, 2007



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⁴ Letter to Kathleen Eddy, Senior Staff Counsel with OAL, from Chisorom U. Okwuosa, Senior Staff Counsel with CDA, dated November 30, 2006.